

COURT OF APPEAL PORT-HARCOURT DIVISION
TUESDAY 5TH JULY, 2011. CA/PH/436/2010
CORAM:- M. D. MUHAMMAD, E. EKO, T. O. AWOTOYE, JJCA

ZENITH BANK PLC APPELLANT
AND
CHIEF AUTHUR JOHN & ORS RESPONDENTS

STATUTES - Interpretation of - As the words which make up the provisions are unambiguous - The same must be given their ordinary literal meaning (H1)

APPEALS - Fresh evidence - Admission of - Conditions - For leave to adduce such evidence - Court must ensure that the evidence must be inter alia - Such as could not have been with reasonable diligence - Obtained for use at the trial (H2)

APPEALS - Interlocutory stage - Determination of substance of the ruling sought to be relied on - Should be at hearing of the substantive appeal - As such issue is not determined at interlocutory stage (H3)

APPEALS - Fresh issue - Raising of - *Anatogu v. Iweka II* - Once an issue is fundamental in nature - Appellate court will for that reason - Be disposed to give leave for it to be raised and heard (H4)

JURISDICTION - Fundamentality of - Question of jurisdiction is a fundamental one - Which is capable of being raised even verbally - And for the first time at the apex court (H5)

FACTS

Appellant/applicant filed this Motion on Notice before the Court of Appeal seeking inter alia, for leave to adduce further evidence, to amend its Notice of Appeal to include an additional ground of appeal and to raise fresh issue which challenges the propriety of the Federal High Court's hearing of plaintiffs/respondents' undefended List proceedings and delivering its judgment therein. The ground for seeking the reliefs is among others, the evidence sought to be ad-

duced came into existence only when the Court of Appeal delivered its ruling, granting application by Shell Petroleum Development Company Nig. Ltd. to stay execution of its judgment in a sum in excess of N1.6 billion. The application is brought under the enabling laws and supported by a ten paragraph affidavit and the annexure thereto. Respondents filed a seven paragraph counter-affidavit to oppose the application.

The genesis of the matter is the suit instituted at the Federal High Court Umuahia by respondents. Respondents later on obtained judgment in the matter for a sum in excess of 1.2 billion naira against Shell Petroleum Development Company Plc. (SPDC). The company not being satisfied appealed to the Court of Appeal. The court stayed execution of the judgment of the High Court being appealed against, pending the determination of the company's appeal before it. Consequent upon the order staying the execution of the judgment, applicant secured the judgment sum with its Guarantee. Subsequently, the court gave judgment in the matter, wherein it affirmed the decision of the trial court. Aggrieved, SPDC appealed to the Supreme Court. It also brought an application praying the Court of Appeal to stay its judgment pending the determination of its appeal at the Supreme Court.

ISSUE FOR DETERMINATION

“Whether having regard to the facts and circumstances of this application the instant application ought to be granted”

HELD (Unanimously granting the application per

MUHAMMAD JCA)

STATUTES - Interpretation of

1. The words which make up the foregoing substantive and adjectival provisions are clear and unambiguous. The principle remains that the meaning of the provisions must be gotten by giving to the words which make them their ordinary literal meaning. (p. 2037 F)

APPEALS - Fresh evidence - Admission of - Conditions

2. In the exercise of the discretionary powers under the rules

to grant leave to an applicant to adduce fresh evidence, the court it has been held, must ensure:

(a) that the evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial, or are matters which have occurred after judgment in the trial court.

(b) In respect of evidence other than those in (a) above, which pertain matters that occurred before or during trial and/or the judgment being appealed against, leave will be granted only on special grounds.

(c) In all situations the evidence to be adduced should be such that if admitted, it would have an important but not necessarily a crucial effect on the whole case and

(d) the evidence to be adduced must be ex facie, credible in the sense that it is capable of being believed. It however need not be incontrovertible. (p. 2038 B)

APPEALS - Interlocutory stage

3. Ex-facie, the ruling the applicant seeks to rely on appears credible. Whether or not the ruling had evolved from a court that lacked the necessary jurisdiction and therefore unavailing to the appellant is a decision to be taken when the substantive appeal is heard. Further comments along these lines are accordingly deferred till then. A substantive issue is never determined at the interlocutory stage. (p. 2038 H)

APPEALS - Fresh issue - Raising of

4. The fundamental nature of the fresh issue the applicant seeks to raise entitles one to disagree with learned senior counsel to the respondents. In *Anatogu v. Iweka II* (1995) 8 NWLR (pt. 415) 547 at 573, it has been held that once an issue is fundamental in nature the appellate court will, for that very reason, be disposed to give leave for it to be raised and heard. (p. 2039 C)

JURISDICTION - Fundamentality of

5. The question of jurisdiction is certainly a fundamental one which on the authorities is capable of being raised even ver-

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bally and for the first time at the Apex court. (p. 2039 F)

REPRESENTATION

T. Oshobi with A. E. Aperua Yusuf and F. C. Giadom, for the Appellant

B L. E. Nwosu SAN with E. Asido, D. E. Ekenna and A. Nworgu, for the Respondents

CASES REFERRED TO

- C Asaboro v. Aruwaji (1974) 4 SC 87
Ladd v. Marshall (1954) 3 All ER 745
Atatogu v. Iweka (1995) 8 NWLR (pt. 415) 547
Akanbi v. Alao (1989) 3 NWLR (pt. 108) 118
Obasi v. Onwuka (1987) 3 NWLR (pt. 61) 364
D RCC v. Vee Pee Ind. (1990) 6 NWLR (pt. 158) 630
Gazu v. Nyam (1998) 2 NWLR (pt. 538) 477
Shonekan v. Smith (1964) 1 All NLR 168
Akpabuyo LG v. Duke (2001) 7 NWLR (pt. 713) 551
AK v. NNPC (2005) All FWLR (pt. 270) 1945
E Okwueze v. Ejiofor (2000) 15 NWLR (pt. 690) 389 CA
Omoijahe v. Umoru (1999) 8 NWLR (pt. 614) 178
A-G of the Federation v. Alkali (1972) 72 SC 29
Dawodu v. Danmole (1962) 7 All NLR 702
F Atswaga v. G. Agena (1964) NWLR 122

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, s. 248
Court of Appeal Rules 2007, O. 4 r. 2

G

LEAD JUDGMENT BY MUHAMMAD JCA

By its Notice of motion dated 31st March and filed on 1st April 2011, the Appellant/Applicant seeks the following reliefs:

- H “1. An order of Honourable court granting leave to the applicant to adduce further evidence in the instant appeal to wit:
(a) The fact that the judgment of the court of appeal, Owerri in Appeal No. CA/PH/103/2006: SPDC V. Chief Authur John, Elder Frank Ule, Chief Silas Oforji & Ors. Delivered on 10th June, 2010 against The Shell Petroleum Development Company of Nigeria Plc.

in a sum in excess of N1.6 billion which payment was secured by the applicant's Bank Guarantee dated 28th September 2009 (which was the "res" in the Proceedings before the lower court leading to the instant appeal) has been stayed by the ruling of the said court on Monday 21st February 2011.

(b) The Certified True Copy of the aforesaid Ruling of the Court of Appeal, Owerri in Appeal No.CA/PH/103/2006: SPDC v. Chief Arthur John, Elder Frank Ule, Chief Silas Oforji & Ors. Dated Monday 21st February 2011 attached herewith as Exhibit IS 1.

2. AN ORDER of this Honourable court granting LEAVE to the Applicant to amend its Notice of Appeal to include an additional ground of appeal (as per Ground 1 of the Proposed Notice of Appeal attached herewith as Exhibit IS 3) which challenges the propriety and competence of the respondents' suit at the Lower Court in view of the Pending application by The Shell Petroleum Development company of Nigeria Limited before the court of Appeal, Owerri, dated 10th June 2010 to stay execution of its judgment sought to be executed by the respondents' suit at the Lower Court.

3. AN ORDER of this Honourable court granting LEAVE to the applicant to raise in the instant appeal a fresh issue which challenges the propriety of the Lower Courts hearing of the respondents' undefended List proceedings and delivering its judgment which had the effect of giving effect to, enforcing and/or executing the Applicant's Bank Guarantee in the face of the Ruling of the court of Appeal, Owerri, delivered on Monday 21st February 2011 staying execution of its judgment sought to be enforced by the respondents, said proceedings.

4. AN ORDER of this Honourable court granting LEAVE to the Applicant to amend its Notice of Appeal to include an additional ground of appeal (as per Ground 9 of the proposed Notice of Appeal attached herewith as Exhibit IS 3) which challenges the propriety of the Lower court's hearing of the respondents' Undefended List proceedings and delivering its Judgment which had the effect of giving effect to, enforcing and/or executing the applicant's Bank Guarantee vis-à-vis the Ruling of Court of Appeal, Owerri, delivered on Monday 21st February 2011 staying execution of its judgment sought to be enforced by the respondent, said proceedings.

5. AN ORDER of this Honourable court granting LEAVE to

the Applicant to amend the Appellant's Brief of Argument to include arguments concerning the aforementioned Ruling which challenges the propriety and competence of the respondent's suit at the Lower Court which led to this appeal.

AND for such ORDERS or FURTHER ORDERS as this Honourable Court may deem fit to make in the circumstances"

The grounds upon which the reliefs are sought are:

"1. The evidence sought to be adduced before this Court come into existence only on Monday 21st February 2011 when the court of Appeal, Owerri delivered its Ruling which granted an application by The Shell Petroleum Development company of Nigeria Limited ("SPDC") dated 10th June 2010 to stay execution of its Judgment in a sum in excess of N1.6 billion. The judgment of the Court of Appeal, Owerri was the substance of the respondents' action before the Lower Court.

2. The said application by the SPDC which granted by the Court of Appeal, Owerri, was filed and served on the respondents before the commencement of the respondent's action before the Lower court which led to the instant appeal.

3. The leave of this Honourable court is required to enable the Honourable court consider the Ruling of the Court of Appeal, Owerri, as well as the issue of the legal propriety and validity of the commencement, continuance of and Judgment in the respondents' action before the Lower Court which led to this appeal.

4. The respondents will not be prejudice in any manner howsoever by the grant of this application because they have the right to appropriately respond to the issues arising therefrom if they so elect".

The application which is brought pursuant to section 36 of the constitution of the Federal Republic of Nigeria 1999, Order 4 rules 2 and 3, order 7 rule 1 of the court of appeal rules 2007 and under the inherent jurisdiction of this court is supported by a ten paragraph affidavit deposed to by Abdulfatai Aperua-Yusuf, a legal practitioner in Messrs. Babalakin & Co. and counsel to the appellant/Applicant and the annexure thereto.

The respondents rely on a seven paragraph counter-affidavit to oppose the application.

From the averments in the two affidavits, certain facts appear beyond dispute. These are recounted immediately.

The respondents to the application to which this ruling relates commenced suit No.FHC/UM/CS/03/2000 at the Federal High Court holden at Umuahia and obtained judgment on 17th November 2005 for a sum in excess of 1.2 billion naira against the Shell Petroleum Development Company Plc. Aggrieved by the decision, the latter appealed to this court by its Notice of appeal No.CA/PH/103/2006. B The Owerri Division of the court stayed execution of the judgment of the Federal High Court being appealed against pending the determination of the appeal before it.

Consequent upon the order staying the execution of the judgment, the applicant herein secured the judgment sum with its Guarantee dated 28th September 2009. The Owerri Division of the court determined the appeal before it on 10th June 2010 by affirming the decision of the Federal High Court. The Shell Petroleum Development Company Plc. has further appealed to the Supreme Court by D its Notice, Exhibit AY1, annexed to the affidavit in support of the instant application. The company also prayed this court to stay its 10th June 2010 judgment pending the determination of the appeal it lodged at the Supreme Court. Paragraphs 3 and 4 of the affidavit in support of applicants' motion on Notice being helpful in our understanding of the facts on which the applicants rely are hereunder E supplied for ease of reference.

"3. I am aware of the following facts from the processes in the Case File of this matter in-Chambers i.e.:

The Federal High Court ('FHC') Umuahia delivered judgment F in SUIT NO. FHC/UM/CS/03/2000: John & Ors v. SPDC on 17th November 2005 against The Shell Petroleum Development Company of Nigeria Ltd ("SPDC") in a sum in excess of N1.2 billion. Aggrieved with the judgment, SPDC appealed to the Court of Appeal ("CA") Owerri vide APPEAL NO.CA/PH/103/2006: SPDC- V. John & Ors.

ii. On 10th October 2006, the CA stayed execution of the judgment on the condition that SPDC provides a Bank Guarantee from the Applicant for the judgment Sum in favour of the judgment H Creditors pending the determination of SPDC's appeal. SPDC provided the Bank Guarantee in compliance with the Order. However, SPDC's appeal was dismissed by the CA on 10th June 2010 and it appealed against the judgment to the Supreme Court ("SC"). At-

tached herewith and marked Exhibit AY 1 is a copy of SPDC's Notice of Appeal to the SC.

iii. SPDC applied to the CA Owerri on 10th June 2010 seeking inter alia a stay of "...execution and or enforcement (whether by garnishee of howsoever)..." of the aforesaid judgments of the FHC Umuahia and CA Owerri pending the determination of its aforesaid appeal to the SC. SPDC also sought injunctive reliefs restraining the respondents and the Applicant from taking any steps in respect of the Judgment Sum pending the determination of its appeal to the SC. Attached herewith and marked Exhibit AY 2 is a copy of SPDC's application.

iv. At the time the respondents commenced the action before the Lower Court, they had been served with SPDC's aforesaid Notice of Appeal to the Supreme Court and application for stay of execution of the Judgment of the CA Owerri. The appeal and application had not been determined at the time although the respondents herein filed a Counter-Affidavit and written Address in opposition thereto on 28th September and 28th October 2010 respectively. The respondents' Counsel herein personally argued the respondents' opposition' to the said pending application.

v. Despite being aware of the pendency of SPDC's appeal to the SC and application for stay before the CA, the respondents desperately commenced the action before the Lower Court and obtained judgment against the applicant on 12th August 2010 to enforce the Judgment thereby attempting to frustrate, asphyxiate and render SPDC's pending appeal at the SC and application for stay before the CA Owerri futile and nugatory in the event that it is successful.

4. I was informed of the following facts by Mr. Michael, the Legal Adviser of the Applicant during a telephone discussion on this matter on Thursday 17th March 2011 and I verily believe him as follows:

i. On Monday 21st February 2011, the Court of Appeal, Owerri, granted SPDC's aforementioned application dated 10th June 2010 to stay execution of its judgment delivered against SPDC which is the substance of the proceedings before the Lower Court and in the instant appeal. Attached herewith and marked Exhibit IS 1 is a Certified True Copy of the said Judgment.

ii. At page 13 of the Ruling, the court of Appeal, Owerri, per Abubakar Jega Abdulkadir JCA, ordered thus:

“...that the execution of the judgment of this court in Appeal No.CA/PH/103/2006 dated 10/6/2010 in the sum of N1,049,187,658.00 (One billion forty nine million one hundred and eighty-seven thousand, six hundred and fifty-eight Naira) be and is hereby stayed...”

iii. He only became aware of the aforesaid Ruling on Thursday 17th March 2011- when he received a CTC of the said Ruling from the SPDC. The said Ruling is material to the effectual determination of this appeal as it directly questions the legal propriety and validity of the commencement, continuance and Judgment of the respondents’ action before the Lower Court which led to this appeal.

iv. He also became aware that SPDC has complied with the Order of the Court of Appeal, Owerri, granting conditional stay of execution on Thursday, 17th March 2011 when he also received a copy of the Bank Guarantee furnished by SPDC. Attached herewith and marked Exhibit IS 2 is a Certified True Copy of the Bank Guarantee”.

In opposition to the foregoing averments of the applicant the 1st respondent deposed in paragraph 3 of his counter-affidavit thus:

“3. That I have read the applicant’s affidavit sworn to by one Abdulfatai Aperua-Yusuf on “April Fools” day, 2011 (01/04/2011) in these proceedings and wish to state as follows:

i. That briefs of argument have been filed and exchanged in these proceedings and the appeal set down for hearing, without more the appeal has been argued.

ii. That the facts contained in applicants paragraph 3 (i) - (v), 5 and 6 have been argued in the various parties said briefs already exchanged.

iii. That the facts deposed to as occurring on 21/02/2011 in paragraph 4 did not occur as at 12th August 2010 when the judgment appealed from in these proceedings was entered against the appellant and did not form part of the record of proceedings upon which this appeal was erected.

iv. I know as a fact that the appellate jurisdiction of this court is limited to an examination of the facts placed before the trial court and to evaluate their application to the law in the reasoning and

conclusions contained in his judgment appealed from.

vi. I Know as a fact that the judgment appealed from was entered under the undefended list procedure based on the affidavit evidence of the parties encapsulating the interpretation of the language, spirit and intendment of the Deed of Guarantee issued to the respondents by the applicant and no more.

vi. I also know as fact that the Central issue in this appeal is whether the appellant's liability on its Guarantee is dependent on any other acts of things outside the dismissal of the appellants appeal in the proceedings of the Court of Appeal Owerri in CA/PH/103/2006, vis-à-vis the admission contained in the applicant's letter of 20/07/2010".

Paragraph 5 f-i of the same counter-affidavit is hereunder also reproduced for their relevance:

"f. I was personally present in Court on the said 21/02/2011.

g. After the abandoned application for Stay was "surprisingly" granted the lady lawyer sought to withdraw the letter but was roundly opposed by our Counsel Lucius E. Nwosu SAN, who promptly filed a motion in that court to have the ruling set aside as being a complete nullity.

h. Now Produced and shown to me is a Certified True Copy of the said letter of SPDC marked EXHIBIT "A".

i. Also now shown to me is a copy of the motion paper to set aside the null and void ruling of the Court of Appeal Owerri marked EXHIBIT "B"

Following an order of this court, parties have filed and exchanged their written addresses which at the hearing of the application' they adopted and relied upon as their arguments for and against the Notice of motion.

In the applicant's written address, a single issue has been submitted on the basis of which learned counsel urges the application should be determined. The issue reads:

"Whether having regard to the facts and circumstances of this application' the instant application ought to be granted"

Mr. Akoni, learned senior counsel to the Applicant' submits that this court is empowered by order 4 rule 2 of the court of Appeal Rules 2007 to receive further evidence on appeal. The applicant seeks to put before us the Owerri Division's ruling delivered on 21st Febru-

ary 2011 staying this courts judgment dated 10th June 2010, Exhibit IS 1. The court's power under the rules of court as interpreted in many judicial decisions is discretionary. He argues that such power is only exercised for the furtherance of justice. Learned counsel then outlined the requirements the applicant should meet if this court is to indulge it. He relies, inter alia, on *Asaboro v. Aruwaji* (1974) 4 SC 87^B at 91, *Ladd v. Marshall* (1954) 3 All ER 745 at 748; *Atatogu v. Iweka* (1995) 8 NWLR (Pt.415) 547 at 588 *Akanbi v. Alao* (1989) 3 NWLR (Pt.108) 118 at 140; *Obasi v. Onwuka* (1987) 3 NWLR (Pt.61) 364 at 370; *RCC v. Vee Pee Ind.* (1990) 6 NWLR (Pt 158) 630 at 638^C and *Gazu v. Nyam* (1998) 2 NWLR (Pt.538) 477 at 493.

The ruling of the Owerri Division of the court of Appeal, argues senior counsel, came into existence on 21st February 2011 after the judgment of the lower court, the subject of the present appeal, had been delivered on 12th August 2010. There was no way the ruling could have been obtained and used by the applicant in the proceedings at the lower court, the Federal High Court, in Port Harcourt.

Secondly, it is submitted, the ruling affects the propriety and foundation of the entire proceedings and judgment of the lower court. Where an applicant succeeds in showing that the court which judgment is being appealed against had proceeded without the requisite jurisdiction, learned senior counsel contends, leave is granted to the applicant to adduce further evidence in an appeal over that court's decision. The ruling of the Owerri Division of this court staying the execution of its judgment being appealed to the Supreme Court, contends, learned senior counsel, highlights a substantial issue which neither the applicants Notice of appeal nor its brief has captured. The question is whether the lower court was right to have entertained the action and delivered judgment in spite of the application for stay of execution of the judgment of the court of appeal. These vital points that touch on the lower court's jurisdiction to enforce a judgment which an appellate court has stayed, it is contended, could not have been raised before the lower court since the court of Appeal's ruling of 21st February 2011 had not come into being then. The issue which highlights a substantial point of law and requires no new evidence for its resolution can only be properly raised and argued in the appeal if the instant application is granted. Non grant of the application argues

learned senior counsel for the applicant, results in miscarriage of justice as it facilitates the enforcement of the judgment of the court of Appeal that had been stayed against the applicant. Relying on *Shonekan v. Smith* (1964) 1 ALL NLR 168, *Akpabuyo LG v. Duke* (2001) 7 NWLR (Pt.713) 551 at 570 and *AK v. NNPC* (2005) ALL B FWLR (pt 270) 1945 at 1965. Learned senior counsel not only urges that leave be granted to the applicant to adduce the fresh evidence, but also to amend its Notice of Appeal as well as its brief of argument in order to raise and argue the fresh issues founded on the fresh evidence. The respondents, it is contended, will not be prejudiced by C the grant of the application.

The respondents adopt the applicant's lone issue for the determination of the instant application in their written address. It is argued in the address that an appeal should be fought on the same D material the case before the trial court had been fought on. The appellate jurisdiction of this court is therefore limited to the examination of the facts placed before the trial court in suit PH/1690/2010 (*Chief Arthur John & Ors. V. Zenith Bank Plc.*) and the application of the law on those facts. Though conceding that this court has power to E receive further evidence on questions of fact in an appeal after a trial on the merits pursuant to order 4 rule of the court's rules, learned senior counsel to the respondents submits that applicants have not satisfied at least three of the conditions the law requires. He further F submits that the central issue the appeal raises borders on applicant's liability by virtue of its guarantee which does not depend on any other factor outside the dismissal by the Owerri Division of Appeal No. CA/PH/103/2006. The ruling staying the judgment of the court in the said appeal, learned senior counsel contends, is extraneous to G the central issue.

In further response, it is argued that the Owerri Division of the court of Appeal's order staying its judgment, which ruling is now sought to be relied upon by the applicant, is incompetent as the application leading to it had been abandoned by the appellant before its delivery. It is further contended that the ruling was delivered after the H appeal at the Supreme Court had been entered. Similar application had also been filed on the same issue at the Supreme Court thereby further robbing the court of appeal the jurisdiction to hear and determine the one before it.

Lastly, the conditional stay occasioned by the 21-2-2011 ruling the applicant seeks to exploit had a 30 days validity which had since lapsed on 21-3-2011. In the circumstance, argues learned respondent's senior counsel, the ruling has ceased to avail the applicant. It does not serve the interest of justice to oblige the applicant. Applicant's other prayers, argues senior counsel, are predicated on the first relief and must equally fail with the failure of the relief on which they are predicated. Learned senior counsel urges that the entire application be dismissed being without merit. B

This court's power to grant the leave the applicant herein seeks to adduce further evidence is provided for particularly under order 4 rule 2 of its 2007 rules which, given S. 248 of the 1999 Constitution, has constitutional application. S 248 of the constitution provides: C

"248 subject to the provisions of any Act of the National Assembly the president of the court of Appeal may make rules for regulating the practice and procedure of the court of Appeal". D

Order 4 rule 2 of the courts rules provide:

"2 The court shall have power to receive further evidence on questions of fact, either by oral examination in court, by affidavit or by deposition taken before an examiner or commissioner as the court may direct, but, in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds." E F

The words which make up the foregoing substantive and adjectival provisions are clear and unambiguous. The principle remains that the meaning of the provisions must be gotten by giving to the words which make them their ordinary literal meaning. See Okwueze v. Ejiofor (2000) 15 NWLR (PT.690) 389 CA and Omoijahe v. Umoru (1999) 8 NWLR (pt.614) 178. In doing that, this court's power to receive fresh evidence on questions of fact clearly comes through. Indeed the court's power under the rule extends to such evidence which existence predated the trial or hearing of the matter leading to the judgment being appealed against provided the reception is anchored on special grounds. The court's power under the enabling rules is discretionary and a set of criteria has over the years been put in place by the courts in the course of H

interpreting this or similar rules. Apposite references to some of these judicial decisions have been made by the learned senior counsel to the applicant.

In *Akanbi v. Alao* (supra) the Supreme Court restated those conditions it earlier outlined in *Attorney General of the Federation v. Mallam Modi Alkali* (1972) 72 SC 29 and *Asaboro v. Armaraji* (supra) an applicant must necessarily satisfy in obtaining leave to adduce fresh evidence on appeal.

In the exercise of the discretionary powers under the rules to grant leave to an applicant to adduce fresh evidence, the court it has been held, must ensure:

(a) that the evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial, or are matters which have occurred after judgment in the trial court.

(b) In respect of evidence other than those in (a) above, which pertain matters that occurred before or during trial and/or the judgment being appealed against, leave will be granted only on special grounds.

(c) In all situations the evidence to be adduced should be such that if admitted, it would have an important but not necessarily a crucial effect on the whole case and

(d) the evidence to be adduced must be ex facie, credible in the sense that it is capable of being believed. It however need not be incontrovertible. See also *Severino v. Witt and Busch* (1912) 2 NLR 77; *Federal Board of Inland Revenue v. J. Rezcaish Ltd* (1961) ALL NLR 722, *Dawodu v. Danmole* (1962) 7 ALL NLR 702, *Atswaga v. G. Agena* (1964) NWLR 122.

In the case at hand the evidence the applicant seeks to adduce undeniably came into existence after the trial of the matter judgment in respect of which forms the basis of the appeal on which the instant application hinges. Learned respondent counsel has made the strenuous but futile effort of discrediting the evidence, the ruling of the Owerri division staying its judgment dated 21-2-2011. ***Ex-facie, the ruling the applicant seeks to rely on appears credible. Whether or not the ruling had evolved from a court that lacked the necessary jurisdiction and therefore unavailing to the appellant is a decision to be taken when the substantive appeal is heard.***

Further comments along these lines are accordingly deferred till then. A substantive issue is never determined at the interlocutory stage. See *Woherem v. Emereuwa* (2004) 13 NWLR (pt. 890) 398 at 418, *University Press Ltd v. I. K. Martins (Nig) Ltd* (2000) 4 NWLR (pt. 654) 584.

Lastly, respondents have urged us to refuse the applicant leave to raise the issue following the use to which it will put the fresh evidence it seeks leave to adduce. It is argued that enabling the applicant raise an issue it had the opportunity of raising at the lower court but failed to and more so because the issue is not covered by the applicant's pleading at the court below negates the time honoured principle that litigations must have an end.

The fundamental nature of the fresh issue the applicant seeks to raise entitles one to disagree with learned senior counsel to the respondents. In *Anatogu v. Iweka II* (1995) 8 NWLR (pt. 415) 547 at 573, it has been held that once an issue is fundamental in nature the appellate court will, for that very reason, be disposed to give leave for it to be raised and heard. See also *Akpene v. Barclays Bank of Nigeria Ltd.* (1971) 1 SC 47; *Raimi v. Akintoye* (1986) 3 NWLR (PT 261) 97 and *Plateau Publishing Co. Ltd. v. Adoply* (1985) 4 NWLR (pt. 34) 205. The applicant seeks to rely on exhibit ISI to contend that the decision it appeals against had arisen from incompetent proceedings. The trial court, the applicant intend to argue in the appeal, lacked the jurisdiction to hear and determine the action. **The question of jurisdiction is certainly a fundamental one which on the authorities is capable of being raised even verbally and for the first time at the Apex court.** See: *Oshotoba v. Olujitan* (2000) 5 NWLR (pt. 655) 159 SC and *Bello v. Usman* (1999) 4 NWLR (pt. 599) 380 CA.

In my considered view, therefore, I find merit in this application. It is accordingly granted. The applicant is indulged in the manner it canvassed under the five reliefs in its Notice of motion. It is further ordered that parties shall bear their respective costs.

EKO JCA

I had read the application and all the processes in it, including the various addresses of the respective counsel, before now. Also

before now I had been privileged to read in draft the ruling just delivered by my learned brother, M. D. MUHAMMAD (OFR), JCA.

One cardinal principle guides my decision in this application. And that is: a substantive issue is never, and should never be, determined at the interlocutory stage. This has been the posture of superior courts of record in this country as can be seen for instance, from the decisions in UNIVERSITY PRESS LTD V. I. K. MARTINS (NIG.) LTD (2000) 4 NWLR (PT.654) 584; WOHEREM V. EMEREUWA (2004) 13 NWLR (PT. 890) 398 AT 418. The King, as our adage says, must not stretch his neck across the hedge to have a glance at the dance troupe coming to perform in his palace. I shall therefore advisedly, not comment on the probative value of the additional evidence being sought to be produced.

Having said this I will only highlight the expected fireworks in the kitty of both senior counsel. The appellant/applicant intends to argue in the appeal, by the additional evidence, that the court below lacked the requisite jurisdiction to hear and determine the matter. This is not only a serious issue, it is a fundamental question. From MADUKOLU v. NKEMDILIM (1962) 1 ALL NLR 587 at 596 it is clear that jurisdiction the court has to adjudicate is a threshold matter that is quite extrinsic to the dispute itself.

From the respondents the argument is also predicated on jurisdiction or the competence the Owerri Division of this Court had to make the order staying its judgment, which ruling is what the applicant seeks to rely upon for this application. They say that ruling has no basis since the application leading to it had been abandoned before its delivery. It is one incompetence to another incompetence. Those are crux of the issues at the hearing of the substantive appeal.

I am not unmindful of the respondents' contention that the appellate jurisdiction of this Court is limited to the facts placed before it at the trial court. That is true. It is also true that the jurisdiction the trial court had to adjudicate in any matter is extrinsic to the issues in dispute inter parte. It is clear to file, from the dicta of the Supreme Court in AKANBI V. ALAO (1989) 3 NWLR (PT. 108) 118 at 140; ATTORNEY-GENERAL FEDERATION V. MALLAM MODI ALKALI (1972) 12 SC 29; ASABORO V. AMARATI (1974) 4 SC 87 at 91, that an appellate court can entertain application for further evidence, and allow, as further evidence in an appeal, even matters that oc-

curred after judgment of the trial court, when they have bearing on the justice or injustice in the matter. The appellate court's jurisdiction is essentially to review the decision of the trial court to see if there had been substantial justice. It exercises this jurisdiction to receive further evidence in the appeal in order to enthrone justice and the rule of law. As Martin Luther Jr. had put it; injustice anywhere is injustice B
everywhere.

Having said all these, I hereby agree with my learned brother that this application be granted and it is hereby granted by me.

C

AWOTOYE JCA

I have had a preview of the judgment of my learned brother M. D. Muhammad, (OFR) J.C.A.

I am in complete agreement with the reasoning and conclu- D
sion in the said judgment. I have nothing more to add.

I agree that the application has merit. It is accordingly granted. I also order that parties are to bear their respective costs.

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